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NO. 91-892

# In the Supreme Court of the United States

OCTOBER TERM, 1991

M. RIEMER CALHOUN, JR.
AND SOUTHLAND PARK APARTMENTS,
a Louisiana Partnership *In Commendam*,
Petitioners,

v.

RANDOLPH T. ODINET, RONALD J. HAGGERTY, LOUIS P. WINESKI, JR., ROBERT J. CRIFASSI, JOHN A. METZLER, JR., GUS L. RIESS, JAMES J. LICCARDI, JR., FLOYD J. LANDRY, ASHLEY HENDERSON AND HENRY J. RODRIGUEZ, JR., INDIVIDUALLY AND AS MEMBERS OF THE ST. BERNARD PARISH POLICE JURY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## RESPONDENTS' BRIEF IN OPPOSITION

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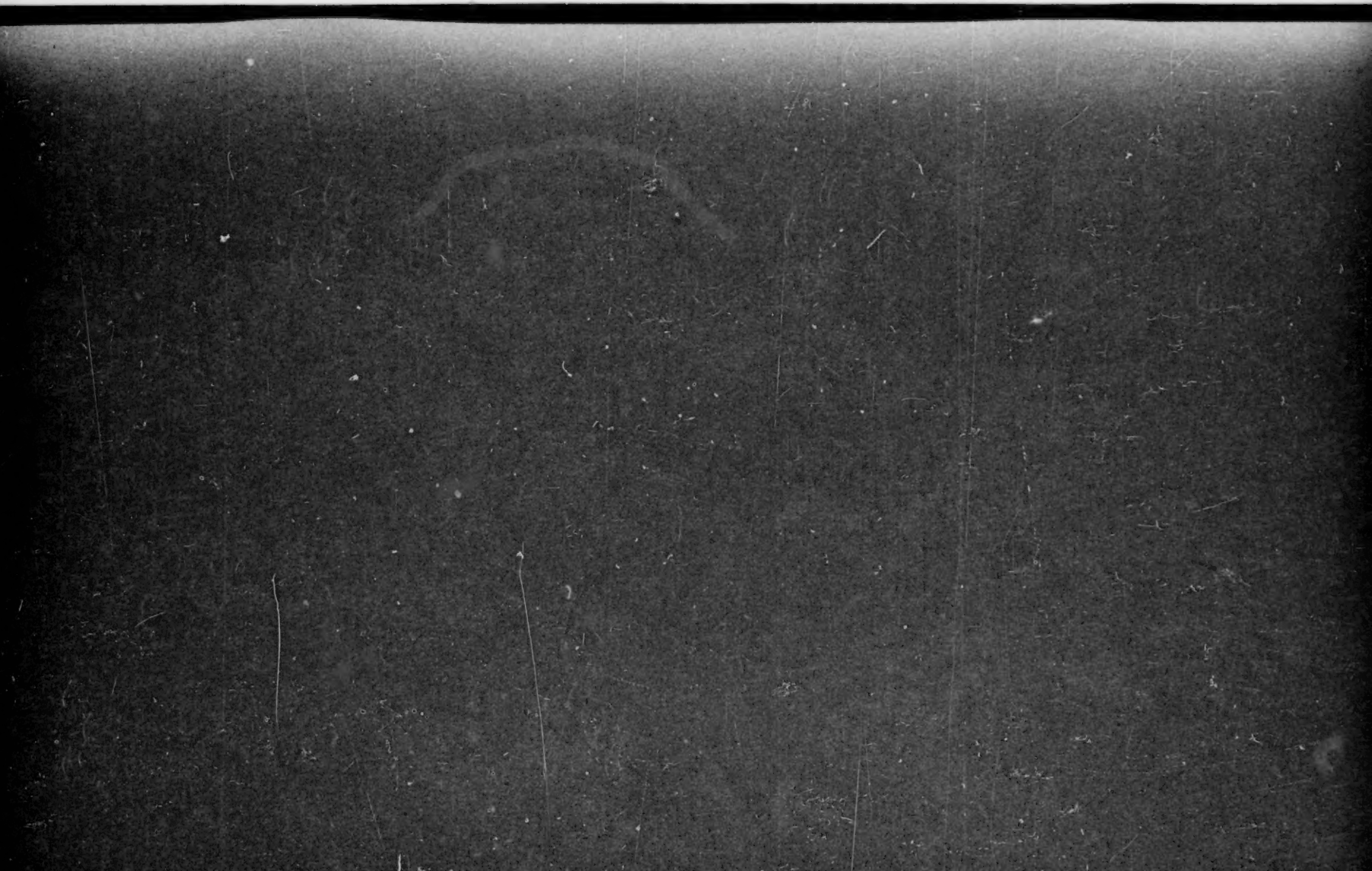

## QUESTIONS PRESENTED

1. Are local government legislators entitled to absolute immunity when sued by a developer in their individual capacities for voting for a construction moratorium that affected his plan to develop?

2. Where the district court does not consider evidence outside of the complaint when it denies defendants' motion to dismiss based on absolute immunity, are issues of fact relevant in determining whether the federal court of appeals has jurisdiction under 28 U.S.C. §1291 to review the denial of the absolute immunity defense?

3. Is it proper for a federal court of appeal to disregard evidence not presented to the district court when the district court ruled on defendants' motion to dismiss and which is not a part of a record on appeal?

## LIST OF PARTIES

1. M. Riemer Calhoun, Jr. and Southland Park Apartments, a Louisiana partnership in *commendum* . . . . . Petitioners

2. Randolph T. Odinet, Ronald J. Haggerty, Louis P. Wineski, Jr., Robert J. Crifassi, John A. Metzler, Jr., Gus L. Riess, James J. Licciardi, Jr., Floyd J. Landry, Ashley Henderson and Henry J. Rodriguez, Jr., individually and as members of the St. Bernard Parish Police Jury . . . . . Respondents

3. St. Bernard Parish . . . . . Defendants In Case Below But Not a Party to This Appeal.

4. Martha L. Cazaubon, Individually and as Director of the St. Bernard Parish Department of Safety and Permits . . . . . Defendant in the Case Below but Not a Party to This Appeal.

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## STATUTORY PROVISIONS INVOLVED

Respondents submit that in addition to the statutes listed by the petitioner, the following rules are pertinent to a decision on this matter.

Federal Rule of Civil Procedure 12(b):

> Every defense, in law or fact, to a claim for relief and any pleading, whether a claim, counterclaim, cross-claim or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may, at the option of the pleader, be made by motion: (1) lack of jurisdiction over the subject matter; (2) lack of jurisdiction over the person; (3) improper venue; (4) insufficiency of process; (5) insufficiency of service of process; (6) failure to state a claim upon which relief can be granted; (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense number (6) to dismiss for failure of the pleading to state a claim upon relief can be granted, matters outside of the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Federal Rules of Appellate Procedure 10(a):

> **Composition of the record on appeal.** The original papers and exhibits filed in the district court, the transcript of the proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal on all cases.

The respondents, Randolph T. Odinet, Ronald J. Haggerty, Louis P. Wineski, Jr., Robert J. Crifassi, John A. Metzler, Jr., Gus L. Reiss, James J. Liccardi, Jr., Floyd J. Landry, Ashley Henderson and Henry J. Rodriguez, respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 937 F.2d 172 (5th Cir., 1991).

## STATEMENT OF FACTS

The respondents appealed this matter to the Fifth Circuit Court of Appeals following the district court's denial of their motion to dismiss based on absolute immunity. The complaint was the only evidence submitted either in support of or against this motion by either respondents or petitioners, M. Riemer Calhoun, Jr. and the Southland Park Apartments, a Louisiana corporation, *in commendam* (hereinafter referred to "Calhoun"). Therefore, the only relevant facts are those alleged in the complaint.[1]

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[1] In Calhoun's Statement of Facts, he quotes extensively from deposition testimony that was not submitted to the trial court at the time of its ruling on the motion to dismiss and was not contained in the complaint, and in fact these depositions were not even taken until after the district court's ruling on respondent's motion to dismiss. This subject is more fully discussed in Section 3 *infra* but for purposes of clarification, respondents point out here that the district court denied respondent's motion to dismiss on August 27, 1990. Calhoun quotes from the deposition of M. Riemer Calhoun and Charlotte Carol which were not

The pertinent facts alleged in Calhoun's Complaint are as follows. On December 8, 1987, the St. Bernard Parish Police Jury enacted an ordinance containing a moratorium, which stated:

> it is moved to place a moratorium for any construction or development of multi-family or commercial establishments from the intersection of East Judge Perez Drive and Highway 46 (Bayou Road) eastward, for 120 days. (App. A, paras. 10-11, pgs. A-6,7).

This moratorium affected many other pieces of property other than the property on which Calhoun held an option. It also prohibited commercial as well as multi-family development.[2]

On April 5, 1988, the St. Bernard Parish Police Jury extended the moratorium's length, but narrowed its scope.

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Footnote 1 continued.

taken until November 13, 1990. Calhoun also quotes from public meeting of the St. Bernard Parish Planning Department which did not occur until September 6, 1990. Calhoun also makes reference to an "unwritten gentlemen's agreement" which is Calhoun's interpretation of testimony given by the police jurors in their depositions on November 14, 1990.

[2] In footnote 3 of the petition, Calhoun argues that the passing of the moratorium violated state law. Calhoun confuses a zoning moratorium with the amendment or establishment of a zoning regulation. The moratorium is an interim zoning measure commonly enacted pending a contemplated zoning change to avoid a rush of the type of development which the zoning change is designed to restrict. It proceeds the actual establishment or amendment of a zoning regulation, and it is not itself the actual zoning change. Building moratoria have long been approved as necessary interim zoning measures. *Schafer v. City of Orleans*, 743 F.2d 1086 (5th Cir. 1984); *Jackson Court Condominiums, Inc. V. City of New Orleans*, 874 F.2d 1070 (5th Cir. 1989). In the present case, the St. Bernard Parish Police Jury this year enacted a zoning change in compliance with La. Rev. Stat. Ann. 33:140.51 - 140.61 (West 1988), changing the zoning of the property contained in the moratorium area.

This ordinance stated:

> it [is] moved to extend the moratorium on issuing building permits in St. Bernard Village for 250' on either side of St. Bernard Highway (La. 46) from its intersection with Judge Perez Drive to Creedmore Canal through October 4, 1988. (App. A, p. A-8, paras. 14-15).

Calhoun formally submitted an application for a building permit shortly after this extension of the moratorium and months after the passage of the original moratorium. (App. A, p. A-8, para. 14). His application proposed a multi-family housing complex, to be financed by the Farmer's Home Administration, a federal agency that provides funding to developers to construct housing for the elderly and persons of low and moderate income. (App. A, p. A-5, para. 5). After submitting his application, Calhoun learned that St. Bernard's Department of Safety and Permits would not issue a permit because his proposed site was within the moratorium area. (App. A, p. A-5, para. 18).

The St. Bernard Parish Police Jury extended the moratorium a second time on January 24, 1989, with the same boundaries previously described, "as recommended by Martha L. Cazaubon, Director/Secretary, Planning Commission." (App. A, pgs. A-10,11, para. 21). Calhoun then revised his application, moving the apartment development 250 feet back from St. Bernard Highway. (App. A, pgs. A-11,12, para. 24). On April 4, 1989, the Department of Safety and Permits issued a building permit to Calhoun based on his revised plans. (App. A, p. A-12, para. 25). The permit was issued for the Southland Park Apartments, "FmHA housing for elderly (multiple family)." (App. A, p. A-12, para. 25).

Calhoun alleges that Farmer's Home refused to release obligated funds for construction because the permit

noted that the Southland Park Apartments were planned as housing for the elderly. (App. A, p. A-12, para. 26). Calhoun made demand upon the St. Bernard Parish Department of Safety & Permits on October 24, 1989, November 6, 1989, and November 20, 1989, insisting that the words "for elderly" be deleted from the permit. (App. A, pgs. A-12,13, para. 27). The Department of Safety & Permits declined to amend the building permit. (App. A, p. A-13 , para. 28). The complaint does not allege that Calhoun sought any action from the police jury or brought his situation to the police jury at any time before filing this complaint against the respondents on November 30, 1989.

In Calhoun's complaint, he named as defendants the Parish of St. Bernard, ten of its individual police jury members, and Martha L. Cazaubon, the Director of the St. Bernard Parish, Department of Safety and Permits.[3] Respondents filed a motion to dismiss pursuant to Rule

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[3] Calhoun claims in his Statement of Fact that Police Juror Rodriguez directly pressured Martha Cazaubon to delay the issuance of Calhoun's building permit. However, a review of the complaint indicates that these facts are not alleged. Although his petition seeks review of a motion to dismiss, Calhoun's Statement of Facts is devoid of any references to his complaint. His complaint was not included in the appendix. It is clear from the complaint that the only alleged action of the police jurors at issue is their passage of the moratorium. Allegations concerning refusal to grant a building permit are directed at Martha Cazaubon, who still remains a defendant in her individual capacity. In footnote 4 of his petition, Calhoun claims that Ms. Cazaubon's Motion for Summary Judgment was denied by the district court on the grounds that she capitulated to Rodriguez's pressure. However, the ruling on Ms. Cazaubon's Motion for Summary Judgment makes no such finding. Calhoun in footnote 4 also asserts that the Fifth Circuit's ruling in this case is "anamolous" because it makes a "meaningless distinction" between Ms. Cazaubon, an administrative official, and Mr. Rodriguez, a local government legislator. However, as more fully explained in Section 1 *infra*, the distinction for purposes of immunity is in accordance with the rulings of this Court and the rulings of other circuit courts of appeals. Additionally, contrary to the representations of Calhoun, Ms. Cazaubon can still assert her entitlement to qualified immunity at trial.

12 (b)(6) of the Federal Rules of Civil Procedure on June 4, 1990 based on absolute and/or qualified immunity. The district court denied the motion in a "Ruling on Motion and Order" entered on August 28, 1990. The defendant police jury members appealed that decision on September 21, 1990.[4]

The Fifth Circuit reversed the district court's ruling on August 1, 1991, holding that passage of the moratorium was a legislative act entitling respondents to absolute

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[4] In footnote 5 of Calhoun's petition, Calhoun implies that it was somehow in error for respondent's to perfect their appeal prior to the completion of discovery. However, as discussed fully in Section 2, *infra*, the denial of an immunity defense is immediately appealable even before the commencement of discovery for the very reason that the immunity defense loses much of its meaning if the defendant has to undergo discovery and trial to determine his entitlement to the immunity. Calhoun also points out that the Fifth Circuit did not consider any of the facts deduced during this discovery as necessary to the resolution of the immunity issue. As more fully discussed in Section 3 *infra*, the Fifth Circuit did not consider these facts because it was reviewing the denial of a motion to dismiss based entirely on the allegations of the complaint. Additionally, this discovery did not take place until after the district court ruled on respondents' motion to dismiss. It was therefore not part of the record on appeal.

Finally, in footnote 5, Calhoun lists the motions respondents filed after the district court's ruling on the immunity issue, indicating that all were denied by the district court. This listing is irrelevant and inaccurate. On March 13, 1991, the district court granted respondent's motion for summary judgment on Calhoun's Fifth Amendment Takings Claim because the district court ruled that claim was not "ripe" because Calhoun never received a final decision from the Parish as to what type of building permit, if any, would be reissued. Furthermore, Calhoun was told that he could receive the requested building permit by merely resubdividing his property to separate the property within the moratorium area from the property in which he intended to build his project. The district court granted the motion for summary judgment also based on this failure to resubdivide and on Calhoun's failure to seek a variance from any local government body before filing suit. Instead, Calhoun filed suit and served the respondents with the complaint on the morning of a police jury meeting at which the moratorium was on the agenda.

immunity regardless of Calhoun's allegation of discriminatory intent. (Petitioner's App. B., p. A-3).[5]

## REASONS WHY THE PETITION SHOULD BE DENIED

### 1. The Decision Below is Not in Conflict with the Decisions of this Court or with the Decisions of all Other United States Courts of Appeals.

The Fifth Circuit held that the respondents' passage of an interim zoning moratorium was a legislative act and, therefore, respondents were entitled to absolute immunity from suit in their individual capacities. The Fifth Circuit reasoned that this Court has adopted a functional approach to immunities that examines the nature of the function lawfully entrusted to the particular official. The Fifth Circuit then reasoned that zoning decisions, such as the passage of an interim zoning moratorium, are legislative acts even though not the initial enactment of an entire zoning code. The fact that a zoning moratorium may be particularized does not mean that type of decision is not legislative because it still involves an evaluation of legislative facts. The Fifth Circuit also recognized that

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[5] In footnote 2 of his petition, Calhoun attempts to turn a routine editorial change in the opinion of the Fifth Circuit into a reason for granting certiorari in this matter. Calhoun attempts to imply a sinister motive in the Fifth Circuit's making the editorial change by describing it as "mysterious," "disturbing" and "inexplicable." However, Calhoun's accusation is flawed as is evident from Section 1, *infra*. Whether Calhoun sued respondents for refusing to grant him a zoning variance or for passing an interim zoning moratorium, the Fifth Circuit's legal analysis should have remained the same. As the Fifth Circuit stated in its opinion "The result accords with *Arlington Heights v. Metropolitan Housing Corporation*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed. 2d 450 (1977), where the court evaluated the denial of a request for rezoning of a specific parcel of property as a legislative act." (Petitioner's Appendix B, page A-7).

legislative immunity would apply regardless of any allegations of discriminatory intent.

Strong policy reasons support immunity for individual public officials. These reasons were articulated in *Scheuer v. Rhodes,* 416 U.S. 232, (1974), as follows:

> The public interest requires decisions and action to enforce laws for the protection of the public ... public officials, whether governors, mayors, or police, legislators or judges, who fail to make decisions when needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices. Implicit in the idea that officials have some immunity - absolute or qualified - for their acts is a recognition that they err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all. 416 U.S. at 241-2.

In *Tenney v. Brandov,* 341 U.S. 367 (1951), the Court held that state legislators acting within the scope of their legislative duty are absolutely immune from civil suits for damages. This absolute immunity from suit was extended to regional legislators in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* 440 U.S. 391 (1979).

*Hernandez v. City of Lafayette,* 643 F.2d 1188 (5th Cir. 1981), *cert. denied,* 455 U.S. 907 (1982), held that a mayor who vetoed an ordinance passed by the city's legislative body was absolutely immune from suit under 42 U.S.C. §1983, the court stating:

> When the mayor exercises his veto power, it constitutes the policy-making decision of an individual elected official. It is as much an exercise

> of legislative decision - as is the vote of a member of Congress, a state legislator, or a city councilman. 643 F.2d at 1194.

The court's decision turned on whether the mayor's task was "legislative," noting "that local legislators are entitled to absolute immunity from suit under §1983 for conduct in the furtherance of their duties." 643 F.2d at 1193. The *Hernandez* court also acknowledged that two other courts of appeal, with the Fifth Circuit in *dictum*, held local legislators entitled to absolute immunity from civil suit under §1983, citing *Rheuark v. Shaw*, 628 F.2d 297, 304 n.12 (5th Cir. 1980); *Bruce v. Riddle*, 631 F.2d 272 (4th Cir. 1980); *Gorman Towers, Inc. v. Bogaslavaski*, 626 F.2d 607, 611-14 (8th Cir. 1980).

In *Hernandez*, the plaintiff complained that the City of Lafayette and its mayor had intentionally delayed a final decision on the rezoning of his property in an effort to depress the market value of his land. *Id.* Holding that the mayor was absolutely immune from suit, the court noted that "zoning is a legislative function of government." *Id.* Like Hernandez, Calhoun alleges that the respondents were motivated by an evil intent. However, the conduct which the complaint places at issue is pure legislative activity - a vote on an interim zoning measure.

Calhoun's wholly conclusory allegations that the moratorium was motivated by a desire to discourage black residents and that the moratorium was targeted at his project, are insufficient to defeat the cloak of immunity for two reasons.[6] First, the ten police jurors' motives for enacting

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[6] These allegations are denied by the defendants.

the legislation are irrelevant to an absolute immunity defense. The entire thrust of the defense is to avoid inquiry into the motives of legislators. In *Tenney, supra.*, this Court stated:

> The claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrence to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience of and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury speculation as to motives. The holding of this court in *Fletcher v. Peck,* (U.S.) 6 Cranch 87, 130, 3 L.Ed. 162, 176, that it was not consonant with our scheme of government for the court to inquire into the motives of legislators, has remained unquestioned . . . in times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and are readily believed. Courts are not the place for such controversies. 341 U.S. at 377-78l.

More recently, in *Rateree v. Rocket,* 852 F.2d 946 (7th Cir. 1988), the court afforded absolute immunity to commissioners approving a budget which eliminated jobs. The court adopted the opinion of the district court, which "found that the actions of the defendants were legislative, not administrative, and were therefore protected, regardless of the defendants' motives." 852 F.2d at 948.

Similarly, in *Healy v. Town of Pembroke Park,* 831 F.2d 989 (11th Cir. 1987), the court affirmed the district court's grant of immunity to a mayor and town commissioners who voted to contract out police services,

eliminating plaintiffs' jobs. The court pointed out that the record contained allegations that anti-union sentiment motivated the vote, but stated that "to use these allegations to penetrate the shield of absolute immunity would create a deterrent to the fact finding and decision making duty of local legislators." *Id.* at 993. As in *Rateree*, the *Healy* court refused to consider the motives of the legislators in affirming summary judgment on the issue of absolute immunity.

Finally, in *Baytree of Inverrary Realty Partners v. City of Lauderhill*, 873 F.2d 1407 (11th Cir. 1989), a realty association alleged that the city's failure to grant its application to amend a zoning decision made was legislative and, therefore, absolutely immune from suit despite allegations of improper motive.

As in *Tenney*, *Rateree*, *Healy*, and *Baytree*, Calhoun's conclusory allegations of improper motive cannot defeat legislative immunity. The balance between a complainant's right to be heard and a public official's right to be free from frivolous personal suits has been struck in favor of the public official, leaving the complainant with a remedy against the public body. This result is essential because immunity questions should be resolved at the "earliest possible stage of the proceedings," and because "immunity from suit extends beyond just defense to liability to include all aspects of civil litigation." *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987); *Jacquez v. Procunier*, 801 F.2d 789, 791 (5th Cir. 1986) (quoting *Mitchell v. Forsyth*, 472 U.S. 11 (1985)). These concerns would be completely mooted if Calhoun's bald allegation of racial motivation could subject the respondents to trial as to why they voted on a particular ordinance.

Second, Calhoun alleges that the moratorium was

enacted, and subsequently extended on two occasions, solely for the purpose of thwarting the Southland Park Apartments. This suggestion, like his claim of racial discrimination, is purely conclusory. Aside from two discussions with Henry Rodriguez, Jr., one of the police jurors, Calhoun does not allege any facts to suggest that the other nine members of the police jury had even heard of the Southland Park Apartments when they voted on the moratorium. The moratorium was passed in December of 1987, and extended in April of 1988, *before* Calhoun submitted an application for a building permit. Calhoun does not suggest that he sought to discuss the Southland Park Apartments at police jury meetings, that he opposed the moratorium at police jury meetings, or that he ever discussed the Southland Park Apartments with any police juror other than Henry Rodriguez, Jr., in whose district the building was proposed. The language of the moratorium itself covered all commercial development as well as multi-family housing. It was not limited to the tract of land which Calhoun had optioned.

Calhoun's complaint does not allege that any of the police jurors denied a building permit to Calhoun, or that the police jurors had the ability to control the issuance of a building permit. Indeed, the Complaint acknowledges that once Calhoun amended his permit application to place the apartments outside of the moratorium area, the Department of Safety & Permits - not the police jury - controlled whether a permit could issue and what it would allow. (App. A, pgs. A-12,13, paras. 27-8).

A case on point with the present case is *Gorman Towers, Inc. v. Bogaslavski,* 626 F.2d 607 (8th Cir. 1980), where the court affirmed dismissal of the individual defendants on the grounds of absolute legislative immunity. A developer and architect contended that city officials conspired to prevent construction of a proposed apartment

complex for the handicapped and elderly by amending the city's zoning ordinance to ban multi-family housing units. While plaintiffs contended that the zoning change prospectively denied them a building permit, the court separated the functions of (a) amending the zoning ordinance and (b) denying an application for a permit. Even though the zoning change impacted plaintiffs' ability to obtain a permit, the court held that the legislators passing the ordinance were absolutely immune from suit, stating:

> Because municipal legislators are closer to their constitutents than either their state or federal counterparts, they are, perhaps, the most vulnerable to and least able to defend lawsuits caused by the passage of legislation. Particularly in the area of land use, where decisions may have an immediate quantifiable impact on both the value and development of property, local legislators should be free to act solely for the public good without the specter of personal liability with the passage of each zoning ordinance. (Citations omitted). 626 F.2d at 612.

The court discussed the following effective checks on unconstitutional conduct which still existed after the local legislators were given absolute immunity for their land use decisions:

> First, rezoning may be attacked on direct judicial review as being arbitrary, capricious, or unreasonable. *Winderoff v. City of Fort Smith*, 251 Ark. 342, 472 S.W.2d 74, 76 (1971). Moreover, an unconstitutional zoning ordinance may be declared invalid in federal court. *See*, e.g., *Parkview Heights Corp. v. City of Black Jack*, 467 F.2d 1208, 1213 (8th Cir. 1972). Further, willful deprivation of civil constitutional rights under color of state law are punishable under 18

> U.S.C. §242, the criminal analog of §1983. *Imbler v. Pachtman, supra,* 424 U.S. at 429, 96 S.Ct. at 994; *see United States v. Gillock,* 445 U.S. 360, 100 S.Ct. 1185, 1193, 63 L.Ed.2d 454 (1980) (official immunity cases have drawn the line at civil actions). Finally, the city directors of Fort Smith are elected officials 'subject to the responsibility and the break of the electoral process'. *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, supra,* 99 S.Ct. at 1181 (Blackmun, J. dissenting). 626 F.2d at 613.

All of the checks discussed in *Gorman Towers* are present here, supporting immunity for the individual defendants. Indeed, this case for immunity is particularly strong because the moratorium was still in effect, still subject to extension or modification, and zoning decisions were still being formulated, when Calhoun served the respondents with his complaint. All of the police jurors were served on December 5, 1989, the morning of a police jury meeeting where the moratorium was on the agenda. Such complaints threaten to influence the legislative process, and illustrate the need for absolute immunity. Moreover, if a plaintiff could circumvent the shield of absolute immunity simply by alleging a discriminatory motive, immunity could never be decided before trial. Again, the doctrine of absolute immunity is intended to avoid precisely that result.

Calhoun strains to characterize this as a case involving a purely administrative decision concerning the issuance of a single building permit. However, his complaint clearly establishes that the respondents' challenged conduct was legislative, the passing of a broad-based moratorium binding all landowners within its purview, not just Calhoun. The complaint does not allege that the individual police jurors had involvement in denying the permit, aside from their votes to pass and extend the building

moratorium. It is plain from the Complaint that Calhoun seeks to hold the respondents individually liable solely due to their votes in support of a building moratorium, conduct which is plainly legislative. The only defendant alleged to have denied a permit is defendant, Martha L. Cazaubon, Director of the St. Bernard Department of Safety & Permits, who still remains a defendant in her individual capacity.

Calhoun cites *Hafer v. Melo*, ____ U.S. ____ (1991); *Forrester v. White*, 484 U.S. 219 (1988); and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) as support for his proposition that the Fifth Circuit's opinion in this case conflicts with the decisions of this Court. However, a review of these decisions shows to the contrary.

*Hafer* is not dispositive of the issues before this Court. It does not change the law governing the Fifth Circuit's opinion. Calhoun describes *Hafer* merely as holding "that state elected officials may be held personally liable for damages under Section 1983 for the constitutional wrongs they commit in their official capacities," (Petition, p. 11). Even cursory analysis of *Hafer* reveals that its holding has no relevance to the Fifth Circuit opinion in this case.

Contrary to the import of Calhoun's Petition, *Hafer* did not hold that public officials performing legislative functions are not immune from suit in their personal capacity. The *Hafer* opinion, in fact, mentions legislative function immunity only one time, and then to reaffirm it. *Hafer*, Slip Op. p. 6. Consistent with this brief reference, the Fifth Circuit held that the individual police jurors are immune based on their legislative functions. Plainly, the *Hafer* decision does not contravene this holding.

The Fifth Circuit's reliance on respondents' performance of legislative functions is apparent from the opening sentence of its discussion of the applicable law. "The Supreme Court has adopted a functional approach to immunities. As the Court recently explained in *Forrester v. White,* 484 U.S. 219, 108 S.Ct. 538, 542, 98 L.Ed.2d 555 (1988), 'we examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted . . . .' " *Calhoun v. St. Bernard Parish,* 937 F.2d 172, 174 (5th Cir. 1991). Employing this analysis, the court reasoned that the individual police jurors are entitled to absolute immunity because they perform a legislative function. Recognizing a variety of officials entitled to legislative immunity, the court ultimately held the respondents "entitled to legislative immunity against damages in their individual capacities." *Id.*

Addressing the argument that particularized zoning ordinances are not the product of legislative action, the Fifth Circuit found *Shelton v. City of College Station,* 780 F.2d 475 (en banc) (5th Cir. 1986), *cert. denied,* 477 U.S. 905 (1986), controlling. *Shelton* rejected the argument that zoning decisions that resembled judicial decision-making are not legislative functions. "It follows that the decision at issue was a *legislative* judgment, an evaluation of *legislative facts,* even though the *legislative* decision was not the initial enactment of a zoning code. Rather, the spot zoning remained *legislative* in character." 937 F.2d at 174 (emphasis added). There can be no doubt the Fifth Circuit's decision rested squarely on the police jurors' *legislative* functions.

*Hafer* decided a broader, threshold issue not present in this case. Legislative function had nothing to do with *Hafer's* holding that a public officer may be sued in a personal capacity under Section 1983. In contrast to

respondents' legislative function, the targeted conduct in *Hafer* was the firing of 21 employees who allegedly had "purchased" their jobs from Ms. Hafer's predecessor in office. She defended against the dismissed employees' Section 1983 actions by contending that she could not be sued in a personal capacity for employment decisions made in her official capacity. This defense was not asserted in the case at bar. This Court granted certiorari to determine "whether state officers may be held personally liable for damages under §1983 based upon actions taken in their official capacities."

This Court held that, although a public official may not be sued under Section 1983 in her official capacity, personal capacity suits are another matter. A public officer may be sued for official acts in a personal capacity under Section 1983, such suits being the primary purpose for Section 1983. The *Hafer* opinion made it clear that holding public officials susceptible to suit does not mean that they may not plead a particularized defense of immunity, such as respondents successfully asserted.

One of Hafer's arguments distinguished two categories of acts taken under color of state law: those outside her authority and those within official authority. She argued that the latter could not support a personal-capacity action. This Court rejected this distinction by recognizing that immunity was not inconsistent with personal-capacity suits. Hafer's argument could not be "reconciled with [the] decisions regarding immunity of government officers otherwise personally liable for acts done in the course of their official duties." Citing the functional basis for immunities, the Court recognized that absolute immunity has been afforded "a very limited class of officials, including . . . legislators carrying out their

*legislative functions . . . .*" *Hafer*, Slip Op. p. 6.[7] The Court explained that this personal immunity (which is the issue in the present case) was unrelated to Hafer's arguments on the issues before the Court. "That Hafer may assert personal immunity within the framework of these cases in no way supports her argument here." *Hafer*, Slip Op. p. 6. Such personal immunity, based on legislative function, is precisely what respondents successfully asserted in the Fifth Circuit. Legislative function immunity, expressly recognized in *Hafer*, is firmly "within its framework." *Hafer* and the Fifth Circuit opinion in this case are therefore completely at harmony.

Calhoun argues that the Fifth Circuit's opinion conflicts with *Forrester v. White*, 484 U.S. 219 (1988) because the Fifth Circuit's opinion did not comply with that portion

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[7] Calhoun miscites the one portion of *Hafer* which is applicable to this case. Calhoun states in his petition at page 11 "Thus, absolute immunity has been extended to 'a very limited class of officials' and the 'officials seeking absolute immunity must show that such immunity is justified for the governmental function at issue.' *Hafer* Slip Op. p. 6". The complete quotation of this passage shows that this Court has extended absolute immunity to a limited class of officials including legislators performing their legislative function, the issue in the present case.

> Rather, immunity from suit under Section 1983 is 'predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it.' *Imbler v. Pachtman*, 424 U.S. 409, 421 (96 S.Ct. 984, 990, 47 L.Ed.2d 128 (1976), an official seeking absolute immunity must show that such immunity is justified for the governmental function at issue, *Burns v. Reed*, 500 U.S. ____, ____, 111 S.Ct. 1934, ____ 114 L.Ed.2d 547 (1991).
>
> This Court has refused to extend absolute immunity beyond a very limited class of officials, including the President of the United States, legislators carrying out their legislative functions, and judges carrying out their judicial functions, 'whose special functions or constitutional status requires complete protection from suit.' *Harlow v. Fitzgerald*, 457 U.S. 800, 807, 102 S.Ct. 2727, 2732, 73 L.Ed.2d 396 (1982)." *Hafer*, Slip Op. p. 6.

of *Forrester* which states "officials who seek exemption from personal liability have the burden of showing that such an exemption is justified by overriding considerations of public policy." 484 U.S. at 224. However, it was unnecessary for the Fifth Circuit to put forth reasons why immunity to legislators is justified by overrriding considerations of public policy. This Court has already determined that public policy requires that legislators be given absolute immunity for performing legislative functions. *Tenney; Lake Country Estates;* and *Hafer.*

Calhoun argues that the Fifth Circuit misplaces reliance on *Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977). The Fifth Circuit merely cited *Arlington Heights* to show that this Court analyzed as a legislative act a request for rezoning of a specific piece of property. The Fifth Circuit recognized, as did this Court in *Arlington Heights,* that a zoning decision that applies to a specific piece of property still involves the evaluation of legislative facts and is a legislative judgment even though not the enactment of a zoning code. The Fifth Circuit reasoned that if denial of a request for rezoning of a specific piece of property is legislative act, then surely respondents' passage of an interim zoning moratorium that affected more than the property on which Calhoun held an option is also a legislative act. Contrary to petitioner's assertions, it was the nature of the decision in *Arlington Heights* that led the Court to treat it as a legislative act rather than the fact that any of the officials may have been acting under authority of a comprehensive zoning plan.

Also contrary to petitioner's assertions, this case does not present the alleged issue left open in *Arlington Heights.* The issue there was whether an equal protection violation could be shown by the racially disproportionate impact of a zoning decision or whether it was necessary to show racially discriminatory intent or purpose. The Court

held that proof of racially discriminatory intent or purpose was required and the Court gave factors to help determine when racially discriminatory intent was a motivating factor in a decision. With regard to the specific facts in *Arlington Heights,* this Court affirmed the lower court's decision that no racially discriminatory intent was involved partly because the restrictive zoning of the property preexisted the town's knowledge of the plan to erect integrated housing. This Court pointed out that had the zoning suddenly been changed upon the town's learning of the integrated housing, this factor would have affected the holding.

The issue of immunity was not involved in *Arlington Heights.* Whether racially discriminatory intent would have have been found if a sudden zoning change had existed has no applicability to this case because a legislator's motive for enacting legislation is irrelevant to an absolute immunity defense. *Tenney.*

Calhoun claims that the Fifth Circuit's ruling is in conflict with every other circuit court of appeals, citing *Haskell v. Washington Township,* 864 F.2d 1266 (6th Cir. 1988); *Bateson v. Geisse,* 857 F.2d 1300 (9th Cir. 1988); *Bello v. Walker,* 840 F.2d 1124 (3rd Cir. 1988); *Cutting v. Muzzey,* 724 F.2d 259 (1st Cir. 1984); *Scott v. Greenville County,* 716 F.2d 1409 (4th Cir. 1983); *Riccobono v. Whitpain Township,* 497 F.Supp. 1364 (E.D. Penn. 1980); and *Frailin & Waldron, Inc. v. County of Henrico, Virginia,* 474 F.Supp. 1315 (E.D. Va. 1979). These cases are factually distinguishable and do not indicate that thse circuits would rule differently from the Fifth Circuit given the facts alleged in Calhoun's complaint.

*Riccobono* is a district court case and therefore does not indicate how the Third Circuit would rule on the issue. Additionally, in *Riccobono,* the plaintiff submitted a building permit and the approval of that permit was direct-

ly voted upon by the township board of supervisors. This is distinguishable from the actions of the respondents in that Calhoun has alleged only the respondents' passed a zoning moratorium that affected his ability to get a permit. Calhoun has not alleged and cannot allege that the respondents have the power to approve or deny permits as was the case in *Riccobono.*

*Cutting* is distinguishable on similar grounds as *Riccobono.* In *Cutting,* the local planning board had the power to approve or disapprove directly plaintiff's proposed subdivision. The board would not approve the subdivision plan until the developer complied with specific conditions it placed on the proposal. Respondents did not directly either approve or disapprove Calhoun's building permit. They merely passed an interim zoning moratorium that affected his ability to obtain a building permit and affected an entire area of St. Bernard Parish.

In *Bello,* the issue of immunity from suit was not raised. Nothing in that decision indicates that the municipal officers were sued in their personal as opposed to their official capacities. *Bello* dealt with whether the allegations were sufficient to state a cause of action on the merits under due process and the Fifth Amendment. *Bello* does not indicate how the Third Circuit would rule on the immunity issue.

The Fourth Circuit's decision in *Scott* is also not at odds with the Fifth Circuit's ruling. *Scott* held that county legislators are entitled to absolute immunity when functioning in a legislative capacity, but that legislative immunity did not apply on the facts which were distinguishable from the case at bar. After the *Scott* plaintiff's permit application was submitted, the county council ordered the halting of the processing of all pending permits. Only the plaintiff's permit was pending at the time. In contrast, Calhoun did not have a permit pending at the

time the moratorium was enacted and the respondents did not specifically direct the permits department to stop processing any pending permit of Calhoun.

*Frailin*, is another district court case and therefore does not indicate how the Fourth Circuit would rule on the immunity issue. The Fifth Circuit's decision is in harmony with *Frailin* as it held both that absolute immunity does extend to local legislators when they perform legislative functions and that zoning decisions to downgrade the zoning in an area are legislative.

*Haskell* also held that legislators of a political subdivision of a state are absolutely immune when acting in a legislative capacity. *Haskell* is not in conflict with the Fifth Circuit's ruling as it did not rule on the immunity issue by remanding the issue for a determination as to whether the actions involved in that case were legislative or administrative. The action in *Haskell* was also distinguishable. After, the plaintiff proposed to open an abortion clinic in the defendant township, the township then passed a zoning ordinance that placed abortion clinics within a certain zoning classification. Within that zoning classification, only three acres of land existed in the township and all three acres were occupied by a cement company, effectively prohibiting the construction of any abortion clinics in the township. In the case at bar, there is no allegation that the moratorium prevented the construction of Calhoun's development everywhere in the Parish of St. Bernard. In fact, the complaint admits that the moratorium only affected the first 250 feet of his property and that it was feasible for him to construct his project on the part of his property that was not within the moratorium area.

*Bateson* is also distinguishable from the Fifth Circuit's opinion because in *Bateson*, the developer applied for a permit and satisfied all conditions that were required to

be permitted. Then the city council changed the zoning on his property alone and voted to withhold the issuance of a permit to him. In the case before this Court, the moratorium affected property other than the property on which Calhoun held an option and Calhoun had not even applied for a permit when the moratorium was passed. Additionally, the respondents never voted to withhold the issuance of a permit to Calhoun. In fact, Calhoun never sought any approval from respondents for his project or even brought the situation to the attention of the police jury.

Calhoun criticizes the Fifth Circuit's reliance on *Shelton v. City of College Station*, 780 F.2d 475 (5th Cir. 1986) (en banc), *cert. denied*, 477 U.S. 905 (1986) implying that the Fifth Circuit used "hypothesized purposes" as it did in *Shelton* to justify the immunity granted in this case. The Fifth Circuit relied on *Shelton* for its holding that the denial of a request for a zoning variance is a legislative act, even if made by a board of zoning adjustments as opposed to a municipal legislative body and even though that decision is not the enactment of a zoning code. The analysis in *Shelton* that included giving hypothesized purposes to a zoning decision concerned *Shelton's* analysis of the merits of the plaintiff's due process claim and not the analysis as to what is a legislative act. For the purposes of determining immunity, *Shelton's* hypothesized purposes are irrelevant because a legislator's motives for enacting legislation are irrelevant to his absolute immunity defense. *Tenney*.

The Fifth Circuit's holding in this case is in harmony with the decisions of this Court and with the decision of other federal circuit courts of appeals. Its approach was not "novel" and was not the establishment of a "distinct minority rule." The Fifth Circuit, in accord with the decisions of this Court, merely extended absolute immunity for what was clearly a legislative function.

**2. The Denial of a Motion to Dismiss Based on Absolute Immunity is Immediately Appealable, and Issues of Fact are Irrelevant to the Review of that Decision.**

This Court held in *Mitchell v. Forsyth*, 472 U.S. 526 (1985) that the denial of a substantial claim of absolute immunity is an order appealable before final judgment and the denial of a claim for qualified immunity, to the extent that it turns on the issue of law, is also an appealable final decision. With regard to absolute immunity, the Court stated in *Mitchell*:

> Thus, the denial of a substantial claim of absolute immunity is an order appealable for final judgment, for the essence of absolute immunity is the possessor's entitlement not to have to answer for his conduct in a civil damages action. *See, Nixon v. Fitzgerald*, 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982); *cf. Helstoski v. Meanor*, 442 U.S. 500, 99 S.Ct. 2445, 61 L.Ed.2d 30 (1979).

This Court stated three reasons why the issue is immediately appealable. First, the denial of a claim of absolute immunity is: "effectively unreviewable on appeal from a final judgment" 472 U.S. at 527 because "the entitlement is an immunity from suit rather than a mere defense to liability; and . . . it is effectively lost if a case is erroneously permitted to go to trial." *Id.* Secondly, the denial of a claim for absolute immunity "will be determined as the defendant's claim of right not to *stand trial* on the plaintiff's allegations, and because '[t]here are simply no further steps that can be taken in the district court to avoid the trial the defendant maintains is barred.' " 472 U.S. at 527. Third, "[A] claim of immunity is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated." *Id.*

On three prior occasions this Court held that orders

denying claims of absolute immunity were immediately appealable. *Nixon v. Fitzgerald*, 472 U.S. 731 (1985) (denial of absolute immunity claim of former President of the United States was an appealable collateral order); *Helstocki v. Meanor*, 442 U.S. 500 (1979) (denial of claim of absolute immunity under speech and debate clause immediately appealable); *Abney v. United States*, 431 U.S. 651 (1977) (denial of claim of immunity under double jeopardy clause immediately appealable).

Calhoun seeks to avoid this line of jurisprudence by relying on the language in the district court's ruling that issues of material fact preclude the granting of respondents' motion to dismiss. This reasoning is incorrect because, as the Fifth Circuit implicitly recognized, there could have been no unresolved issues of material fact, because respondents' motion to dismiss was based on the allegations of Calhoun's complaint, and no evidence was submitted to the court. Therefore, the issue before the Fifth Circuit was purely a legal one, whether the allegations of plaintiff's complaint were sufficient to overcome respondents' absolute immunity defense.

Fed. R. Civ. P. 12(b) states in pertinent part:

> If, on motion asserting the defense numbered [6] to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside of the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Under this language, a district court may convert a 12(b)(6) motion to dismiss into a motion for summary judgment when the parties submit, and the court considers,

material extraneous to the complaint. *Mahoney v. Addicks Utility District of Farris County,* 836 F.2d 921 (5th Cir. 1988); *Voisin's Oyster House, Inc. v. Guidry,* 799 F.2d 183 (5th Cir. 1986); *Goodwin v. Elkins & Company,* 730 F.2d 99 (3d Cir. 1984) n.9, *cert. den.* 469 U.S. 831; *Louisiana v. United States,* 656 F.Supp. 1310 (W.D. La 1986), *aff'd* 832 F.2d 935 (5th Cir. 1986), *cert. den.* 485 U.S. 1033 (1986). The notes of the advisory committee on Rule 12(b) explain how this rule operates:

> On motion under Rule 12(b)(6) to dismiss for failure of the complaint to state a good claim, the trial court should have authority to permit the introduction of extraneous matter, such as may be offered on a motion for summary judgment, and if it does not exclude such matter, the motion should be treated as a motion for summary judgment and disposed of in the manner and on the conditions stated in Rule 56 relating to summary judgments, and, of course, in such a situations, *when the case reaches the Circuit Court of Appeals, that court should treat the motion in the same way.*
>
> . . .
>
> The addition at the end of subdivision (b) makes it clear that on a motion under Rule 12(b)(6) extraneous material may not be considered if the court excludes it, but that if the court does not exclude such material, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. It will also be observed that if a motion under Rule 12(b)(6) is thus converted into a summary judgment motion, the amendment ensures that *both parties shall be given a reasonable opportunity to submit affidavits and exchange proofs to avoid taking a party by surprise through the conversion of the motion into a motion for summary judgment.*

Emphasis supplied).

As can be seen from the cases and the advisory committee notes, an appellate court treats a 12(b)(6) motion to dismiss as a motion for summary judgment only when the trial court was presented with and considered material outside of the complaint. Also, as stated in Rule 12(b) and in the advisory committee notes, when the district court converts a 12(b)(6) motion to dismiss into a motion for summary judgment and considers material outside of the complaint, the district court should give all parties reasonable opportunity to submit extraneous proof prior to ruling on the motion to dismiss.

In this case, the district court did not convert respondents' 12(b)(6) motion to dismiss into a summary judgment. The district court was not presented with any material outside of the complaint, and it did not give the parties time prior to ruling to submit extraneous material. Since the district court treated respondents' motion as a motion to dismiss under Rule 12(b)(6) and only considered the material contained in the complaint, the issue before the Fifth Circuit was purely legal, and no unresolved issues of material fact existed.

Calhoun cites *Johnson v. Odom*, 910 F.2d 1273 (5th Cir. 1991) and *Feagley v. Waddill*, 868 F.2d 1437 (5th Cir. 1989) for the proposition that if other panels of the Fifth Circuit were involved in this case, those panels would have dismissed respondents' appeal based upon unresolved issues of material fact. Calhoun fails to point out that *Johnson* and *Feagley* involved the denial of a motion for *summary judgment* based only upon a *qualified* immunity defense.

The order denying respondents' motion to dismiss on the grounds of absolute legislative immunity falls squarely within the collateral order exception to the final judgment rule, and is immediately appealable. This appeal raises the

question whether the complaint on its face states a claim against any of ten elected officials. There are no "genuine issues of fact" pertinent to that inquiry. The motion to dismiss, unlike a motion for summary judgment, "raises an issue of law as to the sufficiency of the well pleaded allegations of the complaint." *Simmons v. Peavy-Welsh Lumber Company,* 113 F.2d 812 (5th Cir. 1940), *cert. denied,* 311 U.S. 685 (1940). *See also Rae v. Union Bank,* 725 F.2d 478 (9th Cir. 1984) ("[A] ruling on a motion to dismiss for failure to state a claim upon which relief can be granted is a ruling on a question of law, freely reviewable by the courts of appeals." *Id.* at 479).

Presumably, Calhoun pled his best case in his complaint, and if the facts there alleged do not defeat the legislative immunity claims of each individual public official, then that public official should be dismissed from suit. Calhoun's argument that the Fifth Circuit lacked jurisdiction over an appeal seeking review of an order denying absolute immunity is without precedent and is not worthy of this Court's review.

### 3. The Fifth Circuit Correctly Disregarded Evidence Not Presented to the District Court and Not Part of the Record on Appeal.

Calhoun states in his petition, "Thus, in order to address the immunity issue, the Fifth Circuit conveniently ignored the deposition testimony, affidavits and exhibits which were part of the record and which the district court reviewed, but were not before the Fifth Circuit given the unusual procedural posture of the appeal." (Petition, page 17). The Fifth Circuit "conveniently ignored" the deposition testimony, affidavits and exhibits because this evidence was not submitted to the district court when it ruled on respondents' motion to dismiss and it was therefore not part of the record on appeal. Calhoun attempted to submit this evidence directly to the Fifth Circuit by

way of "record excerpts" although none of this material was part of the record at the time the district court decided the motion to dismiss. In fact, the deposition testimony that Calhoun sought to submit to the Fifth Circuit had not even been taken at the time the court ruled on the motion to dismiss.[8] Therefore, the deposition testimony, affidavits and exhibits were not a part of the record and the district court did not review these documents prior to ruling on respondents' motion to dismiss. Furthermore, this evidence went to the motives of respondents which are irrelevant to the consideration of the absolute immunity defense. *Tenney.*

Fed. Rule App. Proc. Rule 10(a) defines the record on appeal:

> The original papers and exhibits filed in the district court, the transcript of the proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases.

Only material which was in fact presented to and considered by the district court is considered part of the record on appeal. *Garcia v. Marine Corporation,* 432 F.2d 6 (5th Cir. 1970); *Weissinger v. United States,* 423 F.2d 795 (5th Cir. 1970); 16 Wright, Miller Cooper and Gressman, Federal Practice and Procedure, Jurisdiction §3956 (1977) at 386. An appellate court will not consider material not considered by the district court, especially when a party submits the material without leave to do so or in lieu of filing a motion to supplement the record. *Butterworth v.*

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[8] The trial court denied defendants' motion to dismiss on August 27, 1990. The depositions of M. Riemer Calhoun, Charlotte Carroll, James C. Howel, Jr. and Thomas L. Frye were taken on November 13, 1990. The deposition of Henry J. Rodriguez, Jr. was taken on September 24, 1990. Calhoun also attempted to introduce at the Fifth Circuit level a transcript of the St. Bernard Parish Planning Department Public Meeting which did not occur until September 6, 1990.

*Bowen*, 796 F.2d 1379 (11th Cir. 1986); *Mitchell v. Tradewinds Company*, 289 F.2d 178 (5th Cir. 1961). As Calhoun did in this case, submitting evidence not considered by the district court with a party's brief on appeal does not suffice to make that material part of the record on appeal and does not substitute for a motion to supplement the record. *In Re: GHR Energy Corporation*, 791 F.2d 1200 (5th Cir. 1986).

Even if the evidence submitted to the appellate court consists of facts discovered since the district court's ruling, these newly discovered facts cannot be considered by the appellate court. Fact finding and creation of the record are functions of the district court and, therefore, the consideration of newly discovered evidence is a matter for the district court. *Goland v. Central Intelligence Agency*, 607 F.2d 339 (D.C. Cir. 1978), *cert. den.* 445 U.S. 927. Accordingly, the Fifth Circuit correctly disregarded the evidence.

## CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CHARLES T. WEIGEL, JR.
McGlinchey, Stafford,
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643 Magazine Street
New Orleans, Louisiana 70130
(504) 586-1200
Counsel for Respondents

## APPENDIX A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

| | | |
|---|---|---|
| M. RIEMER CALHOUN, JR. | * | CIVIL ACTION |
| AND SOUTHLAND PARK | * | NO. 89-5160 |
| APARTMENTS, A LOUISIANA | * | |
| PARTNERSHIP | * | |
| *IN COMMENDAM* | * | SECTION 6 |
| | * | |
| VERSUS | * | |
| | * | |
| ST. BERNARD PARISH: | * | |
| RANDOLPH T. ODINET, | * | |
| RONALD J. HAGGERTY, | * | |
| LOUIS P. WINESKI, JR., | * | MAG. DIV. |
| ROBERT J. CRITASI, JOHN A. | * | |
| METZLER, JR., GUS L. RIESS, | * | |
| JAMES J. LICCIARDI, JR., | * | |
| FLOYD J. LANDRY, ASHLEY | * | |
| HENDERSON AND HENRY J. | * | |
| RODRIGUEZ, JR., IN- | * | |
| DIVIDUALLY AND AS | * | |
| MEMBERS OF THE ST. | * | |
| BERNARD PARISH POLICE | * | |
| JURY: MARTHA L. | * | |
| CAZAUBON, INDIVIDUALLY | * | |
| AND AS DIRECTOR OF THE | * | |
| ST. BERNARD PARISH | * | |
| DEPARTMENT OF SAFETY | * | |
| AND PERMITS | * | |

## COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF, WRIT OF MANDAMUS, AND DAMAGE

The Complaint of M. Riemer Calhoun, Jr., a citizen of the State of Louisiana, and Southland Park Apartments, A Louisiana Partnership *In Commendam* (collectively "Calhoun") with respect represents:

### PARTIES

1.

The following are made defendants herein:

(a) St. Bernard Parish, a political subdivision duly organized and existing under the laws of the State of Louisiana;

(b) Ralph T. Odinet, a Louisiana citizen who is a member of the St. Bernard Parish Police Jury;

(c) Ronald J. Haggerty, a Louisiana citizen who is a member of the St. Bernard Parish Police Jury;

(d) Louis P. Wineski, Jr., a Louisiana citizen who is a member of the St. Bernard Parish Police Jury;

(e) Robert J. Critasi, a Louisiana citizen who is a member of the St. Bernard Parish Police Jury;

(f) John A. Metzler, Jr., a Louisiana citizen who is a member of the St. Bernard Parish Police Jury;

(g) Gus L. Riess, a Louisiana citizen who is a member of the St. Bernard Parish Police Jury;

(h) Floyd J. Landry, a Louisiana citizen who is a member of the St. Bernard Parish Police Jury;

(i) Ashley Henderson, a Louisiana citizen who is a member of the St. Bernard Parish Police Jury;

(j) Henry J. Rodriguez, a Louisiana citizen who is a member of the St. Bernard Parish Police Jury;

(k) Martha L. Cazaubon, the duly acting and authorized Director of the St. Bernard Parish Department of Safety and Permits.

## PRELIMINARY STATEMENT

2.

Calhoun has submitted an application for a building permit with the St. Bernard Parish Department of Safety and Permits to construct a multi-family housing complex, to be called the Southland Park Apartments, for occupancy by persons of low and moderate income, with an emphasis on the elderly, in St. Bernard Parish, State of Louisiana. This is an action by Calhoun requesting the following relief:

(a) that this Court declare as unconstitutional construction moratoria enacted by the St. Bernard Parish Police Jury solely for the purpose of preventing the construction of the Southland Park Apartments and bearing no substantial relation to the public health, safety or welfare;

(b) that this Court declare as unconstitutional the St. Bernard Parish Comprehensive Zoning Ordinance because it contains no standard for the uniform exercise of power by the St. Bernard Parish Department of Safety and Per-

mits to grant or deny applications for the issuance of building permits;

(c) that if the construction moratoria are constitutional, the Court issue a writ of mandamus compelling the St. Bernard Parish Department of Safety and Permits to grant to Calhoun a building permit to allow for the construction of the Southland Park Apartments on the grounds that since the site of this project is located outside the moratorium area, the moratoria have been unreasonably and arbitrarily applied to deny Calhoun a building permit; and

(d) that if the St. Bernard Parish Comprehensive Zoning Ordinance is constitutional, the Court issue a writ of mandamus compelling the St. Bernard Parish Department of Safety and Permits to grant to Calhoun a building permit on the grounds that Calhoun has been denied a building permit solely because of the imposition of unreasonable and arbitrary conditions or requirements by Martha L. Cazaubon not set forth in any ordinance, code or regulation of St. Bernard Parish.

## JURISDICTION

3.

The declaratory relief and writ of mandamus is sought pursuant to 28 U.S.C. §§ 2201 and 2202. This action is authorized by 42 U.S.C. § 1983 based upon invasion by defendants of Calhoun's Fourteenth Amendment rights. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1331 in that this is a civil action arising under the Fourteenth Amendment to the United States Constitution and the laws of the United States, more particularly the Civil Right Act, 42 U.S.C. §§ 1981-1983.

## VENUE

4.

Venue is proper under 28 U.S.C. § 1391(b) in that all defendants reside in this district and the claims of Calhoun set forth herein arose in this judicial district.

## FACTS

5.

Calhoun, a real estate developer for more than 30 years, has, since 1987, sought to develop a particular parcel of land located in lower St. Bernard Parish for the purpose of constructing the Southland Park Apartments, a proposed multi-family housing complex for the elderly and persons of low and moderate incomes. The Southland Park Apartments is to be financed by the Farmers Home Administration ("FmHA"), a federal agency that provides funding to developers to construct housing for the elderly and persons of low and moderate income.

6.

On October 4, 1987, Calhoun acquired an option to purchase a tract of land at 1202 Bayou road which is located in an unincorporated area of the Parish of St. Bernard, but within the jurisdiction of the St. Bernard Police Jury and the St. Bernard Parish Department of Safety and Permits.

7.

At all times material herein, the site of the Southland Apartments was and still is classified as A-1 according to

the St. Bernard Parish Comprehensive Zoning Ordinance, which said classification is appropriate for the above-described apartment complex proposed to be built by Calhoun.

8.

At or about the same time Calhoun obtained this option to purchase the land, he also formed the Southland Park Apartments Partnership to construct the project, obtained the earmarking of federal subsidy funds from the FmHA to construct the project, obtained a favorable Environmental Impact Statement, and received favorable review of and a recommendation for the project from the Regional Planning Commission, the State of Louisiana and defendant, Henry J. Rodriguez ("Rodriguez"), a St. Bernard Parish Police Jury member in whose district the Southland Park Apartments are to be built.

## THE CONSTRUCTION MORATORIUM

9.

However, though Rodriguez initially supported the construction of the Southland Park Apartments, he then reversed himself and later informed Calhoun that he opposed the construction of Southland Park Apartments because of its proximity to a certain neighborhood and due to the racial composition of the proposed tenants.

10.

Thus, shortly after Rodriguez voiced his opposition to Calhoun, the St. Bernard Parish Police Jury, on December 8, 1987 and with full knowledge of Calhoun's intention and preparatory steps to construct the Southland

Park Apartments, enacted a vague, arbitrary and discriminatory interim construction moratorium limiting the construction of all multi-family dwellings for a period of 120 days in the general geographical area or vicinity where the Southland Park Apartments were to be constructed.

11.

This December 8, 1987 construction moratorium stated:

> . . . it is moved to place a moratorium for any construction or [sic] development of multi-family or commercial establishments from the intersection of East Judge Perez Drive and Highway 46 (Bayou Road) Eastward, for 120 days.

12.

The said ordinance of December 8, 1987 was arbitrarily enacted by the St. Bernard Parish Police Jury for the sole purpose of frustrating Calhoun's proposed construction of the Southland Park Apartments, without any valid reason and bearing no substantial relation to the public health, safety or welfare. The only urgency for the enactment by the St. Bernard Parish Police Jury of this interim moratorium was that defendants knew of the proposed construction of Southland Park Apartments by Calhoun, that the residents could, due to their economic circumstances, include racial minorities and that it was the desire of the defendants to frustrate or prevent its construction.

13.

In late March of 1988, a representative of Calhoun,

without any knowledge of the December 8, 1987 construction moratorium, contacted the St. Bernard Parish Department of Safety and Permits to obtain information about filing fees and any additional requirements necessary to complete the application process for a building permit. Although the St. Bernard Parish Department of Safety and Permits personnel knew precisely where the Southland Park Apartments were to be built, they did not inform Calhoun of the existing moratorium.

## THE MORATORIUM IS EXTENDED

14.

Nonetheless, before Calhoun formally submitted his application for a building permit, the St. Bernard Parish Police Jury, on April 5, 1988, hastily and with uncanny dispatch, moved to extend this construction moratorium, this time prohibiting the issuance of building permits within 250′ of the St. Bernard Highway. The St. Bernard Parish Police Jury enacted this April 5, 1988 ordinance with full knowledge that the proposed site of the Southland Park Apartments was less than 250′ from the St. Bernard Highway and that this April 5, 1988 ordinance would once again place the Southland Park Apartments in a moratorium area.

15.

This April 5, 1988 ordinance stated:

> . . . it [is] moved to extend the moratorium on issuing building permits in St. Bernard Village for 250 feet on either side of St. Bernard Highway (La. 46) from its intersection with Judge Perez Drive to Creedmore Canal through October 4, 1988.

16.

Like the first moratorium, the said ordinance of April 5, 1988 was arbitrarily enacted by the St. Bernard Parish Police Jury for the sole purpose of frustrating Calhoun's proposed construction of the Southland Park Apartments, without any valid reason and bearing no substantial relation to the public health, safety or welfare. The only reason for the extension of the interim moratorium by the St. Bernard Parish Police Jury was that it knew of the proposed construction of the Southland Park Apartments by Calhoun, that the residents would, due to their economic circumstance, include racial minorities and that it was the desire of the St. Bernard Parish Police Jury to frustrate or perevent its construction.

17.

At or about the same time the April 5, 1988 ordinance was enacted, Calhoun submitted a formal application to the St. Bernard Parish Department of Safety and Permits for a building permit to erect the Southland Park Apartments. In accordance with instructions that had been given to him earlier in March of 1988 by personnel at the St. Bernard Parish Department of Safety and Permits, Calhoun submitted detailed plans and specifications, all of which complied in all respects with the requirements of the St. Bernard Parish Building Code and all other applicable ordinances of the Parish of St. Bernard, thereby entitling Calhoun to the immediate issuance of the requested building permit.

18.

It was only after Calhoun submitted his application for a building permit that he learned, through the St.

Bernard Parish Department of Safety and Permits personnel, of the existing construction moratorium. As a result of this moratorium, the St. Bernard Parish Department of Safety and Permits refused to issue a building permit.

19.

Calhoun's application for a building permit was still pending with the St. Bernard Parish Department of Safety and Permits when the April 5, 1988 construction moratorium expired by its terms on October 4, 1988. In late December of 1988, one of Calhoun's representatives, James C. Howell, Jr., contacted the St. Bernard Parish Department of Safety and Permits and requested that it act upon Calhoun's application in light of the expiration of the moratorium.

## THE CONSTRUCTION MORATORIUM IS AGAIN EXTENDED

20.

Shortly after Calhoun reiterated his demand that the St. Bernard Parish Department of Safety and Permits act upon this application for a building permit and while his application for a building permit was pending, the St. Bernard Parish Police Jury, on January 24, 1989, for the third time enacted an interim construction moratorium again limited to and affecting only that general geographical area or vicinity where the Southland Park Apartments were to be constructed.

This January 24, 1989 ordinance stated:

> . . . it [is] moved to extend the moratorium on issuing building permits for multi-family units for

commercial development in St. Bernard Village for 250 feet on either side of St. Bernard Highway (La. 46) from its intersection with Judge Perez Drive to Creedmore Canal through December 31, 1989, as recommended by Martha L. Cazaubon, Director/Secretary, Planning Commission.

22.

Like the other two moratoria, the January 24, 1989 ordinance was arbitrarily enacted by the St. Bernard Parish Police Jury for the sole purpose of frustrating Calhoun's proposed construction of the Southland Park Apartments, without any valid reason and bearing no substantial relation to the public health, safety or welfare. The only reason for the extension of the interim moratorium by the St. Bernard Parish Police Jury was that it knew of the proposed construction of the Southland Park Apartments by Calhoun, that the residents would, due to their economic circumstances, include racial minorities and that it was the desire of St. Bernard Parish Police Jury to frustrate or prevent its construction.

23.

In March of 1989, Calhoun again contacted the St. Bernard Parish Department of Safety and Permits and requested that it act upon his application for a building permit. Calhoun was then informed that the moratorium had been re-enacted on January 24, 1989 and since the proposed construction site was within 250' of St. Bernard Highway, the moratorium prohibited the St. Bernard Parish Department of Safety and Permits from issuing a building permit.

24.

Shortly after being informed of the re-enactment of

the construction moratorium, Calhoun elected to revise his application and moved the proposed construction site of the Southland Park Apartments more than 250′ back from the St. Bernard Highway. This revision thus placed the construction site outside the moratorium area and into a A-1 zoning classification which is appropriate for the construction of the Southland Park Apartments.

25.

On April 4, 1989, the St. Bernard Parish Department of Safety and Permits finally relented and issued Building permit No. 331-89 to Calhoun for the construction of the Southland Park Apartments. However, in issuing the building permit, the use was arbitrarily designated as "FmHA Housing for Elderly (Multiple Family)." By designatiing the building permit for use as elderly, the St. Bernard Parish Department of Safety and Permits misapplied St. Bernard Parish's zoning classification for the A-1 property and arbitrarily and without authority made the use more restrictive than that provided for in the St. Bernard Parish Comprehensive Zoning Ordinance.

26.

As a consequence of this limitation of use restricted to the elderly only, the FmHA refused to release obligated funds for the construction of Southland Park Apartments. Furthermore, FmHA, due to the lengthy delay, gave formal notice to Calhoun that it was going to withdraw obligated funds for the construction of Southland Park Apartments should Calhoun fail to timely commence construction.

27.

After the building permit was issued, Calhoun made

demand on October 24, 1989, November 6, 1989 and November 20, 1989 upon the St. Bernard Parish Department of Safety and Permits and requested that the Building permit be revised and reissued to reflect the use as "Multiple Family" rather than a more restrictive designation as "Elderly" only.

28.

Each said demand for the issuance of a corrected building permit was denied by the St. Bernard Parish Department of Safety and Permits through the imposition of arbitrary and unreasonable requirements or conditions not set forth in any St. Bernard Parish code, ordinance or regulation. Although the proposed site of the Southland Park Apartments is located outside the moratorium area and the Southland Park Apartments will be a conforming use according to the zoning classification of the St. Bernard Parish Comprehensive Zoning Ordinance, the St. Bernard Parish Department of Safety and Permits arbitrarily and unreasonably applied or extended the construction moratoria to the proposed site of the Southland Park Apartments to frustrate or prevent the issuance of a building permit to Calhoun.

## FIRST CAUSE OF ACTION
## DUE PROCESS

29.

Calhoun re-avers each and every averment contained in Paragraphs 4 through 27 hereof.

30.

The actions of the St. Bernard Police Jury and its

members in enacting construction moratoria on December 8, 1987, April 5, 1988 and January 24, 1989 has deprived Calhoun of his property without due process of law, in violation of the Fourteenth Amendment to the United States Constitution and the Civil Rights Act, 42 U.S.C. §§ 1981-83, as shown by the non-exclusive particulars:

(a) the above construction moratoria are each unconstitutional since they were enacted without a sufficient basis in law or fact and bear no substantial relation to the public health, safety and welfare, and because they were enacted solely to prevent or frustrate the construction of Southland Park Apartments.

(b) The above construction moratoria are each unconstitutional since they give the St. Bernard Parish Police Jury absolute and total control to prohibit multi-family housing based upon prejudice against and hostility toward members of racial minorities; and

(c) The enactment of the above mentioned construction moratoria is unconstitutional, unlawful, arbitrary, capricious and unreasonable in its application since it is confiscatory and the construction moratoria prohibits the primary and most reasonable use of the area.

31.

Calhoun is entitled to a declaration of rights concerning the effect and validity of the above referenced construction moratoria since Calhoun is a person whose rights are being affected by a governmental regulation and an actual justicible controversy exists in that Calhoun has been denied a building permit on the basis of the enactment of said construction moratoria.

32.

The Parish of St. Bernard Comprehensive Zoning Ordinance has deprived Calhoun of his property without due process of law, in violation of the Fourteenth Amendment to the United States Constitution and the Civil Rights Act, 42 U.S.C. §§ 1981-83, as shown by the non-exclusive particulars:

(a) The St. Bernard Parish Comprehensive Zoning Ordinance is unconstitutional because it contains no definite and adequate standards for the uniform exercise of the power by the St. Bernard Parish Department of Safety and Permits to grant or deny applications for building permits;

(b) The St. Bernard Parish Comprehensive Zoning Ordinance unconstitutionally delegates to the Director of the St. Bernard Parish Department of Safety and Permits unbridled and unfettered discretion to control or develop the Parish of St. Bernard by granting or denying permits without sufficient definite notice to an applicant of his rights under the St. Bernard Parish Comprehensive Zoning Ordinance.

33.

Calhoun is entitled to a declaration of rights concerning the effect and validity of the St. Bernard Parish Comprehensive Zoning Ordinance since Calhoun is a person whose rights are being affected by a governmental regulation and an actual justicible controversy exists in that Calhoun has been denied a building permit for his property on the basis of the St. Bernard Parish Comprehensive Zoning Ordinance.

34.

The actions of Martha L. Cazaubon, Director of the St. Bernard Parish Department of Safety and Permits have deprived Calhoun of his property without due process of law, in violation of the Fourteenth Amendment to the United States Constitution and the Civil Rights Act, 42 U.S.C. §§ 1981-83, as shown by the non-exclusive particulars:

(a) Martha L. Cazaubon has arbitrarily, capriciously and unreasonably denied Calhoun's request for a building permit by impermissible imposing conditions or requirements that are not set forth in any statute, code, regulation or ordinance of St. Bernard Parish.

(b) Martha L. Cazaubon has unlawfully and arbitrarily imposed a condition or requirement that Calhoun resubdivide the property where the Southland Park Apartments is to be erected on the basis of the construction moratoria when no such requirement exists in any statute, code, regulation or ordinance of St. Bernard Parish.

35.

Calhoun is entitled to the issuance of a writ of mandamus herein, directed to Martha L. Cazaubon and commanding her in her official capacity as Director of the St. Bernard Parish Department of Safety and Permits to issue a building permit to Calhoun since the Southland Park Apartments is to be erected in an area zoned A-1 which classification is appropriate for the construction of the said Southland Park Apartments.

## SECOND CAUSE OF ACTION
## EQUAL PROTECTION

36.

Calhoun re-avers each and every averment contained in Paragraphs 4 through 27 hereof.

37.

The defendants' actions are in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and of the Civil Rights Act, 42 U.S.C. §§ 1981-1983, as shown by the following non-exclusive particulars:

(a) The defendants arbitrarily and capriciously caused Calhoun's building permit to be denied or refused its issuance and have deliberately frustrated or prevented the construction of Southland Park Apartments for the sole purpose of excluding low income minorities from certain areas in St. Bernard Parish even though Calhoun fully complied with all of the prerequisites for the issuance of the building permit and had fully satisfied all applicable building code and zoning and planning requirements of the Parish of St. Bernard;

(b) By their arbitrary and capricious actions of denying or frustrating the issuance of a building permit for the construction of Southland Park Apartments, defendants have discriminated and continue to discriminate against potential residents of Southland Park Apartments on account of race by perpetuating and maintaining discriminatory zoning practices and procedures, the purpose and effect of which is to exclude black and other non-white minorities from certain areas of St. Bernard Parish.

## THIRD CAUSE OF ACTION
## MONETARY DAMAGES

38.

Calhoun re-avers each and every averment contained in Paragraphs 4 through 27 hereof.

39.

Calhoun has incurred a great expense in preparing plans and specifications for the construction of the said Southland Park Apartments and any delay in carrying out such plans will cause Calhoun to incur further expenses, to his great damage and injury.

40.

Calhoun cannot lawfully proceed without the said building permit, and defendants have arbitrarily and capriciously frustrated, prevented or caused a building permit not to issue without any legal justification. Furthermore, any further delay jeopardizes funds that have been obligated by the FmHA for the construction of Southland Park Apartments.

41.

Should Calhoun lose obligated funds for the construction of Southland Park Apartments because of defendants' unlawful actions, Calhoun is entitled to damages for loss of profits and/or business opportunity in the amount of ONE MILLION AND NO/100 ($1,000,000.00) DOLLARS, punitive damages in the amount of THREE MILLION AND NO/100 ($3,000,000.00) DOLLARS due to defendants' outrageous and unconscionable behavior,

together with attorney's fees and all costs of this proceeding, all of which said damages will be more fully established in the trial of this matter.

Calhoun avers that he has made amicable demand, but to no avail.

WHEREFORE, plaintiffs M. Riemer Calhoun, Jr. and Southland Park Apartments, A Louisiana Partnership *In Commendam* pray that:

(1) The Court declare that the defendants' actions in the matters set forth hereinabove have violated plaintiffs' rights of due process of law as secured by the Fourteenth Amendment to the United States Constitution and the Civil Rights Act, 42 U.S.C. §§ 1981-1983;

(2) The Court declare that the defendants' actions in the matters set forth hereinabove have violated plaintiffs' rights to equal protection of the laws as secured by the Fourteenth Amendment to the United States Constitution and the Civil Rights Act, 42 U.S.C. §§ 1981-1983;

(3) The court order Martha L. Cazaubon, as Director of the St. Bernard Parish Department of Safety and Permits to issue a building permit to plaintiffs for the construction of Southland Park Apartments;

(4) The Court permanently enjoin defendants, their successors in office and all persons acting under them from interfering with the construction or completion of said Southland Park Apartments;

(5) In the alternative, the Court award monetary damages to M. Riemer Calhoun, Jr. against defendants in the amount of FOUR MILLION AND NO/100

($4,000,000.00) DOLLARS in the event obligated funds are withdrawn during the pendency of this lawsuit, the exact amount which will be established at the trial on the merits;

(6) The Court award plaintiffs costs herein and reasonable attorneys' fees; and

(7) The court grant to plaintiffs such other and further relief as this Court may deem just and proper.

Respectfully submitted,

OF COUNSEL:

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(4446c)

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